

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 6854 of 2022
Date of complaint : 19.10.2022
First date of Hearing : 17.02.2023
Date of decision : 17.08.2023

Smt. Poonam Sachdev
R/o H. No. 121,
Spaze Privy,
Sector-72, Gurugram, Haryana-122001.

Complainant

Versus

Shine Buildcon Private Limited
Regd. Office at: H-334, Ground Floor, New
Rajinder Nagar, New Delhi-110060.

Respondent

CORAM:

Sh. Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Ashish Budhiraja (Advocate)
Sh. Pankaj Chandola (Advocate)

**Complainant
Respondent**

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the



Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details
1	Name and location of the project	"70 Grandwalk" at sector 70, Gurgaon, Haryana
2	Nature of the project	Commercial
3	Project area	2.8 acres
4	DTCP license no.	34 of 2012 dated 15.04.2012 valid upto 14.04.2020
5	Name of Licensee	Shine Buildcon
6	RERA Registered/ not registered	Registered vide no. 28 of 2017 dated 28.07.2017
7	Unit no.	C-203, 2 nd floor (As per page no. 41 of complaint)
8	Unit area admeasuring	368 sq. ft. (Super area) (As per page no. 41 of complaint)
9	Date of allotment	05.10.2015 (As per page no. 35 of complaint)
10	Date of builder buyer agreement	28.01.2016 (As per page no. 38 of complaint)
11	Possession Clause	13(ii) <i>Subject to Force Majeure, as defined herein and further subject to the allottee having complied with all its obligations under the terms and conditions of this agreement and not having defaulted under any provision(s) of this agreement including but not limited to the timely payment of all dues and charges including the total sale consideration, registration</i>

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		<i>charges, stamp duty and other charges and also subject to the allottee having complied with all formalities or documentation as prescribed by the Company, the company proposes to offer the possession of the said shop to the allottee within a period of 42 months from the date of signing of this agreement or approval of the Building plans, whichever is later ("Commitment Period"). The allottee further agrees and understands that the company shall additionally be entitled to a period of six months, after the expiry of the said commitment period to allow for unseen delays beyond the reasonable control of the company.</i>
12	Due date of possession	28.07.2020 (including grace period which was provided in BBA for unforeseen delays) [Calculated from the date of signing of buyer's agreement]
13	Sale consideration	Rs. 30,36,000/- (exclusive of taxes) (As per page no. 48 of complaint)
14	Amount paid by the complainant	Rs. 18,31,971/- (including taxes) (As alleged by the complainant)
15	Occupation certificate	Although applied on 07.02.2023 but not yet obtained
16	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainant has made the following submissions in the complaint:
 - I. That representatives of the respondent company visited the complaint and showed a promising image of a project named "70 Grandwalk" by tapasya at Sector 70, Gurugram, Haryana by Shine Buildcon Pvt. Ltd.

and assured that all the plans have been sanctioned and the construction has started and will be completed on time.

- II. That being lured by the false commitments of the respondent-company, the complainant paid advance amount of Rs.3,14,857/- to the respondent and the respondent issued an allotment letter for shop no. C-203, Second Floor, 70 GRANDWALK having super area of 368 sq.ft. plus car parking to the complainant for the total cost of the unit of Rs. 30,36,000/- and she has paid a total sum of Rs. 18,31,971/- in all.
- III. That a buyer's agreement for shop was duly executed between the complainant and the respondent on 28.01.2016. The agreement had a detailed clause in case of failure to deliver possession by the developer under clause 13. As per clause 13 of the agreement, the respondent had agreed to deliver the possession of the shop within 42 months from the date of signing of this agreement or approval of the building plans, whichever is later with an extended grace period of 6 months. That the agreement was executed on 28.01.2016 and the respondent had to deliver the possession of the shop by 28.01.2020.
- IV. That despite receiving of more than 50% approximately payments on time for all the demands raised by the respondent for the said shop and despite repeated requests and reminders over phone calls and personal visits of the complainant, the respondent has failed to deliver the possession of the allotted shop to the complainant within stipulated period.
- V. That the delivery of possession of the shop allotted to the complainant has been delayed due to non-completion of the said project by the

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respondent on time due to illegal misappropriation of the funds, callous attitude and malafide of the respondent.

- VI. That the cause of action for filing of the present complaint arose when the respondent got signed an illegal and arbitrary agreement from the complainant. The cause of action subsequently arose on multiple occasions when the complainant made requests to the respondent to complete the construction on time. The cause of action arose when the respondent failed to deliver possession of the shop and failed to pay delayed possession charges to the complainant.
- VII. That due to above acts of the respondent the complainant has been unnecessarily harassed mentally as well as financially, therefore the respondent is liable to compensate the complainant on account of the aforesaid act of unfair trade practice.

C. Relief sought by the complainant:

4. The complainant sought following relief(s):
- i. Direct the respondent to handover the possession of the shop booked by the complainant.
 - ii. Direct the respondent to pay delayed possession charges @ 18% per annum from the date of each payment made by the complainant.
 - iii. Direct the respondent to complete the construction as per the approved layout plan and provide all the amenities as promised.
 - iv. Direct the respondent to pay a sum of Rs. 1,00,000/- as litigation expenses to the complainant.

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5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent vide reply dated 01.08.2023 contested the complaint on the following grounds: -
- i. That the project named "70 Grandwalk" is a commercial project being developed in accordance with the provisions of the Affordable Housing Policy, 2013.
 - ii. That the complainant is seeking interest on the paid-up amount of Rs.21,56,903.39/-.
 - iii. Thereafter, the respondent vide allotment letter dated 15.10.2015, allotted a unit bearing no. C-203 on second floor, admeasuring super area of 368 sq. ft. (34.19 sq. mtr.) approximately, in the aforesaid project. Further, on 28.01.2016, a buyer's agreement, was executed between the complainant and the respondent pertaining to the said shop having a basic sale consideration of Rs. 35,25,200/-.
 - iv. That as per the provision of clause 13 of the agreement, the possession of the shop was proposed to be handed over within a period of 42 months from the date of signing of the agreement or approval of building plans, whichever is later along with grace period of 6 months (hereinafter referred to as 'Grace Period') and as per the same the possession was to be handed over on or before 28.01.2020 which was subject to force majeure circumstances.

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- v. It is submitted that inspite after being aware of the fact that complainant had defaulted in paying the instalments and had less than the half of the total sale consideration i.e., Rs. 18,31,971/- against the total sale consideration of Rs. 30,36,000/- and yet a substantial amount was due on account of the Complainant
 - vi. That the project of the respondent was delayed on account of various intervening factors like lockdown imposed due to Covid-19 pandemic, shortage of labour, stopping of work by National Green Tribunal and other authorities due to increase in pollution etc.
 - vii. That the entire construction has been done and the project is near to competition. However, the formalities of obtaining occupation certificate remains pending.
6. All other averments made in the complaint were denied in toto.
 7. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submissions made by the complainant.

E. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in

question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on objections raised by the respondent.

F.I Objection regarding delay due to force majeure circumstances

12. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by NGT and weather conditions of Delhi NCR region and non-payment of instalment by different allottees of the

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project, but all the pleas advanced in this regard are devoid of merit. The buyer's agreement was executed between the parties on 28.01.2016 and as per terms and conditions of the said agreement the due date of handing over of possession comes out to be 28.01.2020 (grace period of 6 months already allowed being unqualified). The events such as various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous as there is a delay of more than three years and even some happening after due date of handing over of possession. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

13. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M. P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 which has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

13. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 28.01.2020 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was

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much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainants.

G. I Direct the respondent to handover the possession of the shop booked by the complainant.

G.II Direct the respondent to pay delayed possession charges @ 18% per annum from the date of each payment made by the complainant.

G.III Direct the respondent to complete the construction as per the approved layout plan and provide all the amenities as promised

14. All the reliefs are taken together being interconnected.

15. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

16. Clause 13 of the buyer's agreement provides for handing over of possession and is reproduced below:

13(ii) "Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale

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Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Shop to the Allottee within a period of 42 months from the date of signing of this agreement or approval of the Building plans, whichever is later ("Commitment Period"). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 6 (Six month) ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company.."

17. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.
18. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The flat agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the builder and the buyer. It is in the interest of both the parties to have a well-drafted buyer's

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agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the unit, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.

19. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

20. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

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21. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 17.08.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
22. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:
- "(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
- Explanation. —For the purpose of this clause—*
- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*
23. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **10.75%** by the respondent/promoter which is the same as is being granted to it in case of delayed possession charges.
24. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contraventions as per provisions of rule 28, the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 13 of the agreement executed between the parties on 28.01.2016, the possession of the subject apartment was to be delivered

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within a period of 42 months from the date of signing of this agreement or approval of the Building plans, whichever is later. Therefore, the due date of handing over possession was 28.01.2020. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 28.01.2016 executed between the parties. Further, no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

25. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate is yet not obtained. The respondent shall offer the possession of the unit in question to the complainant after completion of the construction as per approved building plan and obtaining occupation certificate. So, it can be said that the complainant shall come to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given two months' time from the date of offer of possession. This two month of reasonable time is being given to the complainant keeping in mind that even after

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intimation of possession practically one has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 28.01.2020 till the expiry of 2 months from the date of valid offer of possession or actual handing over of possession and whichever is earlier.

26. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 28.01.2016 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 28.01.2020 till the date of valid offer of possession plus 2 months or actual handing over of possession, whichever is earlier; at prescribed rate i.e., 10.75% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G.II Compensation Cost.

27. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14,

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18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation

H. Directions of the authority

28. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent shall pay delay possession interest on the paid up amount by the complainant at the prescribed rate i.e., 10.75% p.a. for every month of delay from due date of possession i.e., 28.01.2020 till offer of possession after obtaining occupation certificate from the competent authority plus 2 months or actual taking over of possession, whichever is earlier; as per proviso to section 18(1) of the Act read with rule 15 of the rules.
 - ii. The respondent is directed to hand over the possession to the complainant allottee on payment of outstanding dues, if any, after adjustment of interest for the delayed period.
 - iii. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the

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promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iv. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

29. Complaint stands disposed of.

30. File be consigned to registry.



(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 17.08.2023



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